United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1965

To Be Argued By
J. DANIEL SAGARIN

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FOR THE SECOND CIRCUIT

NO. 74-1965

MODERN HOME INSTITUTE, INC.
ROMAC RESOURCES, INC.

Plaintiffs - Appellants

VS.

HARTFORD ACCIDENT AND INDEMNITY COMPANY
HARTFORD FIRE AND INSURANCE CO.
THE AETNA CASUALTY AND SURETY CO.
THE TRAVELERS INSURANCE COMPANY
THE TRAVELERS INDEMNITY CO.
THE CONNECTICUT ASSOCIATION OF INDEPENDENT INSURANCE AGENTS, INC.

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

PLAINTIFFS - APPELLANTS' BRIEF

J. DANIEL SAGARIN, ESQ.
855 Main Street
Bridgeport, Connecticut

LEONARD A. SCHINE, ESQ.
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Westport, Connecticut

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ISSUES PRESENTED

1. Did the District Court Err In Resolving Conflicting Material Issues of Fact?

2. Did the District Court Fail to Provide Plaintiffs With the Benefit of Inferences Reasonably Drawn From the Facts in the Record?

3. Do Not the Facts Demonstrate That the Defendant Companies Refusals to Purchase List of X-dates Were Nonunilateral, Interdependent, and Illegal?

4. Were There Not Sufficient Facts Which Plaintiffs Were Entitled to Have a Jury Consider?

STATEMENT OF THE CASE

This is an appeal from a Summary Judgment entered in favor of all of the defendants by the United States District Court for the District of Connecticut (Blumenfeld, J.) on June 21, 1974. The Judgment was entered upon the lower courts Ruling on Motions for Summary Judgment of June 18, 1974. That Ruling was entered approximately one (1) year after the parties had filed their brief and orally argued the matter to District Judge T. Emmett Clarie. Following oral argument before Judge Clarie (Vol. III, Doc. No. 12, Transcript of June 25, 1973) Judge Clarie had reserved decision, but thereafter on July 13, 1973, advised the parties of a potential conflict of interest based on his prior representation of one of the defendant companies during his law practice. The case was then assigned to Judge Blumenfeld for decision. Judge Blumenfeld's decision was made without the benefit of the oral argument, a fact which we believe is reflected in what we believe to be misapprehensions about plaintiffs case which are contained in his ruling.

The Summary Judgment disposed of these two (2) actions for trebled damages against casualty insurance companies and the Connecticut Association of Independant Agents (CAIA) charging them with Sherman Act violations predicated on an alleged group boycott. The action was begun by Romac Resources, Inc. on April 15, 1966 and a second action was brought by Modern Home Institute, Inc. several weeks later. Modern Home Institute, Inc. is the parent of Romac. The complaints were consolidated since they were identical on June 29, 1966. Following extensive discovery proceedings plaintiffs filed a Substituted Consolidated Complaint. Both complaints had initially named, in addition to the present defendants, several direct writer insurance companies as party's defendant. At a pre-trial conference on September 28, 1972, plaintiffs advised the court that the action against the direct writers and the allegations of the complaint which dealt with them were to be dismissed

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1. An agency company is one which writes its business through agents who are not employees. A direct writer is one which writes its business primarily through employees.

since plaintiffs, on completion of discovery believed that the direct writers were not involved in a combination or conspiracy restraint of trade. Stipulations were subsequently filed dismissing all of the direct writer defendants. The remaining defendants are Hartford Accident and Indemnity Company and Hartford Fire Insurance Company ("The Hartford"), the Aetna Causalty Insurity Company ("Aetna"), The Travelers Insurance Company and Travelers Indemnity Company ("Travelers"), and the Connecticut Association of Independent Insurance Agents ("CAIA").

A Notice of Appeal was timely filed.

STATEMENT OF FACTS

A. Introduction

This case involves the development and attempted sale of lists of automobile insurance policy expiration dates (X-dates) by the plaintiffs. Plaintiff Modern Home Institute Inc. is a New York corporation which from 1958 until 1962 was engaged in the business of gathering information known as "family profiles" and selling this information to various merchants. The method of gathering the information was by use of telephone and by the development of sophisticated questionnaires which unskilled callers would be able to use in order to obtain particular information of use to various members of the business community. In September of 1960, Modern Home established an office in Cleveland, Ohio in furtherance of its family profile business. Mr. Robert D'Arpa, then a Secretary and Director of Modern Home, was placed in charge of the operation. D'Arpa leased an office and obtained personnel on a part time basis to gather necessary information by telephone. During that period of time that

the Cleveland office was in operation the idea and methodology of acquiring list of X-dates and selling such lists to insurance companies was explored. An X-date is a date on which an automobile insurance policy was expiring. The X-dates have been referred to by defendants own witnesses as "the life blood of the industry". (Barlow, 4117, The President of the CAIA stated that, "the words 'expiration dates' signal a 'red' flag to independant insurance agents" (Crossen, 4145, The reason that expiration dates are the life blood of the industry and are so important to independant insurance agents is that most buyers of automobile insurance are unwilling to change policies midstream but are approachable for savings as to cost or for improved coverage at the same price at the time at which their automobile insurance policies are expiring. Thus, one in control of information as to X-dates is in a position to offer the insurance buyer either premium savings or coverage improvement, or both. Having developed the list of expiration dates, and having expended in excess of One Hundred Thousand Dollars so doing. (Plaintiff sought to market

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2. The references in parenthesis name the deponent and the page number on which particular testimony appears. The second reference is a reference to the appendix.

the lists of expiration dates between May and August of 1962. In 1962, plaintiff Romac Resources was organized during that period of time as a selling agent subsidiary of Modern Home. Ultimately, each of the insurance company defendants refused to purchase the list of expiration dates from the plaintiff. The issue which was before the district judge, and that which is before this court, is whether those refusals were based upon unilateral and ordinary business decisions or whether they were part of a pattern of conduct evidencing an agreement among the defendants in violation of the Sherman Act. In our legal argument, infra., we must necessarily refer to the facts which are part of the record in this case which we believe Judge Blumenfeld improperly disregarded in reaching his decision. Therefore, we will not repeat the same here. Suffice it to say, that in plaintiffs view, those facts provide a basis from which a jury could infer the following:

1. That each of the defendant companies was initially extremely interested in purchasing plaintiffs

expiration date lists.

2. That a basic tenet of the American Agency System to which all of the defendants belong was an agreement, expressed or implied, that the business of developing expiration dates would be left to individual agents. A corollary of that tenet is that new entrants into the business of developing expiration dates would not be permitted.

3. That the company which purchased and used accurate expiration date lists would be at a competitive advantage over companies which did not have such lists.

4. That it would not be in the best interest of any of the companies to turn down plaintiffs proposal without assurance that other companies would similarly turn down plaintiffs offer.

5. That a campaign of pressure to prevent purchase of expiration dates from the plaintiff was mounted by the Hartford company and the CAIA, that when the publicity and pressure was beginning to die down that

the Travelers joined the campaign and that the Aetna subsequently succumbed to the threats, thus indicating insurance company defendants non-purchase decisions were unilateral, but rather interdependant based on coercion, pressure and an unlawful structure and custom of the agency insurance industry.

ARGUMENT

A. THE DISTRICT COURT ERRED IN RESOLVING CONFLICTING FACTUAL ISSUES AND IN DRAWING INSTANCES FROM THOSE CONFLICTING FACTUAL ISSUES IN FAVOR OF THE DEFENDANTS.

1. Introduction

In Section I of the Ruling below, (   ) the district judge set forth the facts on which he based his rulings on the antitrust implications in Section II. We cannot say that the facts which the district judge found were not facts which a trier of fact might ultimately be permitted to find.

If this were an appeal following a trial based on the records in this case, it would be difficult for us to say that the district judge's findings taken in the light most favorable to the defendant could not be sustained. But since this is a summary judgment proceeding, the opposite rule must hold. We believe hereinafter it will clearly be demonstrated that the district judge erred in ignoring facts favorable to the plaintiffs and in not drawing permissible inferences

favorable to the plaintiffs from those facts.

2. In a Summary Judgment Proceeding a Court May Not Draw Factual Inferences in Favor of the Moving Party and Must View the Evidence in the Light Most Favorable to the Non-Moving Party.

Although this is an antitrust action, the usual principles applicable to summary judgments apply. United States v. Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993, 8 L. ed 2d 176 (1962); Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S. Ct. 486, 7 L. ed 2d 458 (1962); White Motor Company v. United States, 272, U.S. 253, 83 S. Ct. 696, 9 L. ed 2d; 6 Moore, Federal Practice 2494 (2d ed. 1974).

These principles have been recounted by Professor Moore in his treatise. Briefly they are:

(a) Rule 56(c) allows pleadings, depositions, answers to interrogatories, admissions on files, affidavits, to be considered in connection with a Motion for Summary Judgment. In addition, the court may consider oral testimony, facts that are subject to judicial notice, stipulations,

consessions of counsel and any additional materials that would be admissible in evidence or otherwise usable at trial.

(b) Legal presumptions may be drawn but the court is not, however, free to draw factual inferences in favor of the moving party.

(c) The moving party has the burden of clearly establishing there is no genuine issue of material fact and its papers are scrutinized with care.

(d) While the existance of an important difficult or complicated question of law is not a bar to summary judgment, the record must be adequate for decision of the legal question presented by the Motion for Summary Judgment.

(e) Both factual inferences and the record as a whole must be viewed in the light most favorable to the party opposing summary judgment.

(f) Summary procedures should be used

sparingly in complex antitrust litigation where motive and intent play leading roles. 6 Moore, supra. at 2435, 2495.

Relying on First National Bank v. City Service, 391 U.S. 253, 289 (1968), Judge Blumenfeld apparently believed that the defendants conclusively showed that the facts upon which plaintiff rely to support their allegations were not susceptible of the interpretation which plaintiffs seeks to give them. (Ruling, p. 20,

In so doing, Judge Blumenfeld ignored the admonition of the Supreme Court that:

> "Summary procedure should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Poller v. Columbia Broadcasting System, Inc. supra. 368, U.S. 464.

In Poller, the court reversed a summary judgment for the defendants in a treble damage suit under the Sherman Act where the litigation was complex, motive and intent were important, proof was largely on the hands of the alleged conspirators and credibility was a factor.

Here, on the other hand, the lower court did not afford plaintiff even the benefit of the rules quoted above, ordinarily applicable to summary judgment proceedings.

Instead he drew inference after inference in favor of the defendants and largely ignored the facts in the record.

B. THE FACTS IN THE RECORD OVERWHELMING DEMONSTRATE THAT THE DEFENDANT COMPANIES REFUSALS TO PURCHASE EXPIRATION DATES WERE NOT UNILATERAL BUSINESS DECISIONS BUT WERE ILLEGALLY INTERDEPENDENT

In this case, the motive and intent of each of the defendants and the role of the CAIA in rejecting plaintiffs offers to sell are crucial to the ultimate determination as to whether the defendants acted as we claim in concert and interdependently or as they claim unilaterally and independently. Cf. Poller v. Columbia Broadcasting System, supra.

Credibility is an important factor to that determination. This is not a case where the liability will turn entirely or even largely upon the existence of documentary

evidence. Rather it would at trial depend upon the credibility of the conflicting testimony, and upon the trier-of-facts' determination of the internally conflicting stories of some of the defendants.

Moreover, here as in Poller, the proof in this case of the conspiracy is largely in the hands of the alleged co-conspirators. We believe plaintiffs would at trial be entitled to the benefit of the trier-of-facts' disbelief of the somewhat incredible and often conflicting statements of the various party defendants.

But even without that, we believe and we advised Judge Clarie in oral argument that if summary judgment were appropriate at all in this case it would be appropriate to grant it to the plaintiffs and not to the defendants. That statement was made because of the existence in the industry of a basic "custom of the industry" which in practice exclusively allocated the business of finding and selling expiration dates to the independent agents, the consequence

of which was to preclude plaintiffs in their attempt to market expiration dates to independant insurance companies.

At oral argument, counsel for defendant Travelers admitted to the existence in the industry of such a custom.

Be that as it may, the facts which we believe the trial judge did not properly consider, but which we urged this court to consider follow. The evidence must be viewed in toto since viewing it separately leads to the pitfall into which the trial judge slipped.

The evidence on record in this case, which consisted primarily of depositions and of documents.

1. The Defendants Were Initially Enthusiastic

The evidence in this case shows that all of the defendant insurance companies were extremely interested in plaintiffs' program. Plaintiffs, as noted above, had developed at great expense, a method of preparing large

lists of expiration dates, the date on which an automobile insurance policy was expiring. The so-called X-dates have been referred to by defendants' own witnesses as the "life blood of the industry". (Barlow, 4117, 3) On May 8, 1963, D'Arpa met with William Ellis, a Secretary of the defendant, Aetna (Ellis-3334, Ellis was responsible for the sales or production efforts, countrywide for the private passenger automobile insurance (Ellis - 3335). At that meeting, Ellis was extremely interested in the program (D'Arpa - 131). On May 9, 1972, the parties decided to test the X-dates and Ellis told D'Arpa to send George Healy, the manager of the Newark office, 100 New Jersey names. These were sent the same day (2-137). On June 29, 1962, Ellis called D'Arpa. He apologized for taking so long to give them the report tests. He stated, "he was delighted with the tests so far...and

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3. The references in parentheses will be to the name of the deponent and to the page number on which the particular testimony appears.

the Newark office found the names, addresses and expiration dates were 95% to 100% correct. They had called on 34 of the 100 names submitted. They reported they had made 7 sales as a result of the 34 calls (D'Arpa - 141).

On May 8, D'Arpa also met with Channing Barlow, together with a vice-president and secretary of the defendant, Hartford companies. Barlow was the head of business development for the Hartford companies (Barlow - 4077-4078). Present at this meeting was one John F. Gilmore, a Secretary in charge of the automobile department at Hartford (Gilmore - 4046) and J. Kenneth Cagney (D'Arpa - 196). Barlow was most interested to know if the plan would be offered to Hartford on an exclusive basis (D'Arpa - 196; Barlow - 4099).

Travelers' response to the D'Arpa meeting was similar. On April 18, 1962, D'Arpa met with Mr. Nash and Mr. Coakley of the Travelers Insurance Company (D'Arpa - 576). At that meeting, D'Arpa was told that Travelers would like to employ the X-date program because it was a very unique way of starting independent Travelers offices (D'Arpa - 577). Thus, according

plaintiffs' testimony, which is corroborated in large part by the testimony of the defendant officers, each of the defendant companies initially expressed enthusiasm for the X-date lists.

2. The Effect of the Principles and Tenets of the American Agency System

The nature of the agency insurance business is such that the agency companies have largely left the business of developing expiration dates to the independent agents. Each of the companies has specific contractual agreements with its agents, which under certain circumstances, primarily that the agent has paid to the company his past due preminums, cede the ownership of expiration dates to the independent agents upon termination of the policies. (See for example, Roby - 5011-5013) But, as admitted by defendants' employees during the depositions, the agreements regarding the business of developing and selling expiration dates go beyond the mere allocation of ownership of expiration date upon termination.

The independent agents individually and as a group, and particularly organizations such as the CAIA representing independent agents have a special concern to prevent new competitors from entering the field of developing expiration dates. John Brooke Crosson, President of the Connecticut Association of Insurance Agents in 1962 (Crosson-4129) stated that, "the words 'expiration dates' signal a 'red flag' to independent insurance agents." (Crosson - 4145) He stated he believed those were the "private property of independent insurance agents and belonging to no one else so any traffic in them would immediately make us feel that if somebody was engaged in expiration dates, either legally or illegally, we would want to know about it" (Crosson - 4145). He went on to say, "they are an important part of the vested interest of the insurance agent in business (Crosson - 4146).

The deposition of Barlow, the Vice-President of the Hartford companies, makes it clear that the protection of the expiration dates and the prevention of competition in

expiration dates was a motivating factor in the rejection and ultimate destruction of plaintiffs' business. It is clear Barlow had a recollection at his deposition of discussing the matter with John Gilmore that he was not concerned solely with the effect of the purchase of the expiration dates, on agents insofar as it related to those agents' business with the Hartford Group. Barlow was asked about his conversations with his colleague Gilmore.

Q. Do you have any recollection of any statement or question that Gilmore might have made or asked?

A. I have a reasonable or hazy recollection of the fact that John was particularly interested in the agency relations question we just touched upon.

Q. That was again, what?

A. Sending of one agent's expiration to another agent.

Q. Even if those expirations dealt with <u>a policy written by another insurer</u>? (Emphasis is added)

A. <u>Yes</u>?

Q. You were really concerned about another agent's <u>expiration or another agent's policy with another company</u>?

A. Yes. Remember I am talking about these as being our agents.

Q. But in that instance the agent had not written the insurance with the Hartford Group?

A. I am talking about expirations of policies written by Hartford in addition to those written by other companies (Barlow at 4096). (See also 4113, last two questions and answers)

Moreover, in response to a question by his own counsel, Barlow stated, "I don't think we would want to be giving one of our agents the expiration dates of another one of our agents, whether or not they were the expiration dates in the Hartford company" (Barlow - 4117). He went on to state his concern about the agents' feelings and, we believe, his concern about the principle or custom in the industry which precluded outside persons from developing and marketing lists of expiration dates. "Agents feel that they own their expirations and that they are--the life blood of their business, the continuation of their business. If we started in traffick-

ing in that as a company, we are taking away one of the things they think are the cornerstones of the American Agency System of doing business" (Barlow - 4118).

Finally, Mr. Barlow was asked:

Q. Would the Hartford have had any objection to the delivery of Ex-dates to their agents if they had been assured that no agency would receive another agent's Hartford policy holders' name?

A. Yes.

Q. It would have objected?

A. Yes. (Barlow - 4116)

Barlow's counterpart of the Travelers Company, Virgil Roby, similarly indicates that his decision not to use plaintiffs' service was dictated by the principles of the American Agency System as previously described. In a letter to George Brodigan of October 1, 1965, Roby states, "I decided it would not be in the best interest of the Travelers or the American Agency System (emphasis applied)". As you know, we have always completely supported the principles of the American Agency System (defendants' Exhibit 1, Roby

deposition).

Similarly, Gilmore stated that--"the competition between two agents is competition within the market leaving the company out of it." (Gilmore deposition - 4055)

According to Roby's present testimony, he stated in rejecting plaintiffs' proposal of an offer of expiration date which everybody seems to be in agreement was a valuable proposal, "I reject. I want to hear no more about it. We are a member of the American Agency System and they own the expirations and we are not going to interfere with their business" (Roby - 5017-5018).

Moreover, as he stated, "and we--I support 100% of the American Agency System, the presidents of the American Agency System for the last twenty-five years have been personal

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4.

At this point, we point out the inconsistency in Roby's claim of complete and immediate denial and rejection of plaintiffs' offer, and the subsequent action of Travelers in a) its letter of May 18, 1962 from John R. Coakley, superintendent of the agencies, to D'Arpa in which he stated, "All of us are extremely interested in the great possibilities of this device, which would provide the important information concerning expiration dates for suburban markets" and of their subsequent action on June 25, 1962 in sending out to managers of the Travelers' Companies Agency Departments a reproduction of a letter sent out by the Hartford Companies and in instructing its managers to notify its agents in similar form (Plaintiffs' Exhibit 3, Roby deposition).

friends of mine, Red Nelson, Council Bluffs, Billy Webb of Statesboro. (Roby - 5006-5007).

This custom in the industry referred variously to as a basic tenet of the American Agency System or a principle of the American Agency System, this red flag which caused the associations of independent agents to wage a pressure campaign against the acceptance of plaintiffs' offer clearly had its effect.

On June 29, 1962, Ellis of Aetna told D'Arpa that some problems were developing based on the publicity that had been given the X-Date program (D'Arpa - 142). On the same date, Ellis sent D'Arpa a memo, "Bob, as per our phone conversation today, don't count us out on this. We will have problems, but who doesn't" (D'Arpa - 143). During a telephone conversation, Ellis said there were rumblings going on that he would send D'Arpa some of the news releases from the organizations in the newspapers that have come out recently (D'Arpa - 144).

Subsequently, Ellis told D'Arpa that the program had not been accepted because he didn't know if it was worth the beating that Aetna would have to take. When D'Arpa asked him what kind of beating you are referring to, Ellis' reply was,

"the pressure from the other companies" (D'Arpa - 162). Ellis admitted to D'Arpa that "Barlow gave out press releases, sent letters to agencies and used every possible means of publicizing the particular program" (D'Arpa - 162).

In July of 1962, Aetna succumbed to the pressure of the other companies and of the independent agents and rejected plaintiffs' offer. This was subsequent to Ellis' statement to D'Arpa, contained in a letter of July 2, 1962, "if we were to play up to the most reactionary segment of the population of the independent agent group and lose the regard of the more aggressive progressive in spirit might we not be winning the battle and losing a war." Unfortunately, the reactionary segment of the population of the independent agent group prevailed.

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5. At the July 10, 1962 meeting, Ellis told D'Arpa that there were definite pressures building up which he wasn't at liberty to disclose fully, but even at that time he hoped to go ahead with the program because of its obvious merit. Ellis told Mack Wallach, the principal of the plaintiffs, that there was a great deal of enthusiasm about the X-dates, but that there were a great many resistences to the X-dates and that these resistences were mounting. Ellis, during the early part of July of 1962, mentioned some of the anecdotes of the insurance industry stating that most of the executives of the various companies met informally and rather frequently as members of an industry. He stated that the members of the industry were trying to protect something which in his opinion, wasn't protectible (Wallach - 1232-1233).

3. The Campaign of Pressure

It is plaintiffs' contention that none of the companies could turn down plaintiffs' proposal without assurance that the other companies would similarly turn down plaintiffs' offer. Accordingly, plaintiffs contend that a campaign of pressure was mounted. It is also plaintiffs' contention that this campaign of pressure started by the Hartford Company and the independent agent associations, particularly the CAIA, the response to and founder in it by the Travelers Company, and the ultimate dependent business decision by Aetna Company taken together constitute a combination in restraint of trade and concerted action within the meaning of the Sherman Act.

Although each of the defendant insurance companies claims that it made an independent decision in turning down plaintiffs' proposal, it is clear that this is not the situation where an offer of a service is made to a company which just turned it down.

In this situation, the simple question is why did the defendants not simply say no to plaintiffs' proposal and leave it at that.

The answer to that question is relatively simple, and is

born out by the testimony and the evidence produced in this case so far. The purchase of expiration dates by Aetna, The Hartford Companies, or the Travelers Companies would give the purchaser a substantial competitive advantage over the other companies in that the solicitation of any automobile sales just prior to expiration, is the most advantageous time to obtain a new customer (Coakley - 5111, Gilmore - 4051, Crossley - 5060, Ellis - 3407.

Sometime in early June, 1962, the Hartford Comapnies sent a letter to all of its group agents describing the proposal of plaintiffs and advising the group agents that the Hartford would be "unwilling to be in the position of furnishing to one independent agent the names and expiration dates of another agent's policy-holders. As referred to earlier, Barlow was referring not only to agents' policies which had been placed with the Hartford, but also agents' policies which had been placed with other companies. It is plaintiffs' contention that this letter was no casual mailing, but rather part of a scheme designed to create an atmosphere of pressure which would prevent Aetna and Travelers from entering into this program. Indeed, it is significant that the Hartford

Companies kept track of each response received to that letter. In a summary sheet, (a document discovered in the Hartford files dated 7/24/62) Hartford had broken down the responses generated by its letter as follows:

Individual agent responses, States, 36; Towns, 145, Agencies, 154 (3 not fully identified--for a total agency response of 157 agents); Editorial mention, in 7 separate commercial journals; State insurance divisions, 4; Insurance agents associations, including Connecticut Association of Independent Agents, by telephone from Jack Crosson of the George B. Fisher Company, President, 16; Mutual agents associations, 2.

A sampling of the response can be found in the production of documents which were kept in the files of the Hartford Companies. Despite denials, it seems clear that Crosson, President of the CAIA had been in touch with the Hartford Companies during the crucial time of preparation and of the sending of the June 6 letter, and certainly prior to the sending of the subsequent June 14 letters. Crosson as much as admits the same in his affidavit. A note in the Hartford file indicates (Exhibit O, Affidavit of John L. Warden) that

Crosson on 6/14/72 called and indicated that both letters were sent to the agents and to the representatives.

This evidence is somewhat contradictory to the position which Crosson took during his deposition (Crosson - 4149) that the only insurance agency that he had been in contact with was the Aetna Company (4149-4152).

We believe that the responses to the Hartford letter of June 6, 1962 are the best evidence of the continuous pressure instigated by Hartford and the association of independent agents and designed to prevent the other companies from purchasing plaintiffs' list of expirations.

One of the most remarkable admissions in this file is that the Travelers Companies, which now takes the position that as of May 18, 1962, they had nothing more to do with plaintiffs, on July 5, 1962, sent out a letter to their producers almost identical in form to the Hartford letter. That the form is almost identical is not surprising, in spite of Roby's refusal at his deposition to admit that he was following verbatim Hartford's letter. The production of documents in this case

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6.

At that meeting, Crosson as President of the association, told Ellis that it was not in the interest of the members of the association for Aetna to buy the expiration dates list (Crosson-4152).

discloses that Travelers had in its possession a copy of the Hartford letter. When Travelers sent its letter to its producers, they referred to the letter attached as a letter written by a Hartford insurance company. On June 25, 1962, however, they had originally attached to that letter a letter listed as to all Hartford Group agents. The Travelers letter went out on or about July 10, 1972. We believe that was the last straw, which caused the Aetna Company to succumb to the campaign of pressure and ultimately to join in the combination and restraint of trade.

Ellis of Aetna fairly admitted the same (Ellis -3452). One of the more interesting letters which we believe amounts to an admission by the Hartford of the purpose of their letter, is a letter of July 13, 1962 to Arthur M. Kelting, a manager of the Hartford Accident and Indemnity Company in Washington, D.C. The letter in response to the letter of July 12, 1962 reads as follows:

"Dear Art:

<u>Sale of Automobile Expirations</u>

You were very thoughtful to send your note on this topic.

This whole affair was somewhat of a calculated risk and I am very glad if it seems to have worked out well in your particular experience."

(Letter July 13, 1962 attached to letter of July 12, 1962 to Barlow from Kelting)

We believe the calculated risk referred to was either the risk that another company might buy this program and that the campaign of pressure would not work or that the defendant might be sued for violation of the antitrust laws.

Thus, there is ample evidence from which the jury can find the existence of a sequence of events constituting an agreement in restraint of trade. As we noted, before, the

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7. There is some reference to a claim of illegality of plaintiffs' program. This claim is wholly without substance. There was neither statute nor regulation prohibiting plaintiffs from developing and selling expiration dates. The only thing that prohibited plaintiffs from doing so was the existence of a restrictive agreement in the industry which prevented any entrance into that market. On August 16, 1962, J.K. Cagney, Assistant Secretary of the Hartford Company wrote to one of his assistant managers in Chicago, Ill. He stated, "While the method involved is very harmful to us from a business standpoint, it is equally true that there is nothing immoral or illegal about it..."

difficulty may be that they have accepted a clear restraint of trade as part of their industry, custom and practice. Acting in accordance with that custom and practice, they have prevented plaintiffs from entering the business of producing and marketing expiration dates and, particularly, the business of producing and marketing expiration dates to independent agency companies.

4. The District Judge Ignored The Above Facts

In his narrative of events the district judge ignored the above facts. For example, in discussing Aetna's rejection of the plan, the district judge states, "Mr. Ellis and Mr. VanGils came away from the July 10, 1972 meeting with Mr. D'Arpa with the definite understanding that unless they took the total number of X-dates to be generated they could not have any, and on the trip home from Pelham they mutually arrived at a decision against the proposal." In making that finding, he gives no credence at all to the fact that this decision closely followed the Travelers late June and early July distribution of a letter identical to that distributed

by the Hartford company in early June and totally ignores Ellis' admission to D'Arpa at the July 10, 1962 meeting that there were "definite pressures building up which he wasn't at liberty to disclose fully," but even at that time he hoped to go ahead with the program because of its obvious merit. Supra. Note 4. He also failed to consider the July 11 Aetna memorandum indicating Aetna was still interested (App. p.) Similarly, in discussing the Travelers' rejection of plaintiffs offer, Judge Blumenfeld does not deal with:

(a) The custom in the industry, admitted to by counsel for the Travelers in effect allocating the business of developing the expiration dates to independent agents.

(b) With the late June distribution to agents of the letter identical to the Hartford letter. (App.

(c) With the inconsistency between Roby's claim of complete and immediate denial and rejection of plaintiffs' offer, and the subsequent actionion of Travelers in: (1) its letter of May 18, 1962 from its superintendent of agencies to D'Arpa in which it is stated, "All of us are extremely interested in the great possibilities of this device which would provide the important information concerning expiration

important information concerning expiration dates for suburban markets; and (2) their subsequent action on June 25, 1962 in distributing a reproduction of the letter sent out by the Hartford companies to its managers; and (3) of Roby's false denial of authorizing the sending of that letter. (

Nor does Judge Blumenfeld deal at all with the question of why the Hartford company did not simply reject plaintiffs' offer, but rather began to mount a sophisticated campaign designed to insure that no other company would purchase plaintiffs' expiration date. Nowhere does he consider the fact that Hartford charted all of the responses of its letter. Nowhere does he consider the fact of substantial contracts during this period of time between various presidents of agency association, including the CAIA, and the Hartford.

Had he considered these, and other facts cited supra in the light most favorable to plaintiff, summary judgment would not have entered.

C. THE FACTS DESCRIBED ABOVE PROVIDE A BASIS FOR FINDING A VIOLATION OF THE SHERMAN ACT.

1. The Complaint

The substituted consolidated complaint (initially charged all of the remaining defendants as well as some direct writers in the first count with a horizontal group boycott aided and abetted by the Connecticut Association of Independent Insurance Agents. Since the direct writers were voluntarily dismissed from the suit there is, for all practicable purposes, no distinction between Count One, which included the direct writers and Count Two, which remained which applied only to the agency companies and the CAIA.

The third, fourth, and fifth counts, applying respectively to The Hartford, Aetna, and Travelers charge each of those companies respectively with agreeing, contracting, combining, conspiring and restrain of trade with its independent agents in writing, in practice, and/or by custom of industry to restrict and

restrain competition in the sale and ownership of lists of names and X-dates, and further charges that the defendant, CAIA, and other state associations of independent agents mounted a campaign of pressure and influence on the defendant agency company in order to obtain agreement by said company to continue and enforce the unlawful restrictions and restraints on competition.

It continues that the defendant agency company responded to said pressure and influence and thereby agreed, in violation of the antitrust law of the United States, to restrain and restrict competition and to continue to restrain and restrict competition in the sale and ownerships of lists of names and X-dates. (Paragraph 39, 41, 46, 48, 53, 55)

Finally, with the dismissal of the case against the direct writers the sixth Count becames irrelevant.

Plaintiff prayed for a judgment that the defendants be adjudged and decreed to have been in violation of the antitrust laws for fifteen million dollars in damages and for such other further relief as was appropriate.

2. Plaintiffs Do Base Their Case On Conscious Parallelism

We believe that the facts cited above were sufficient to allow trier of fact to determine whether plaintiffs' allegations were, in fact, true.

In so stating, we are not, as Judge Blumenfeld indicates relying on the doctrine of conscious parallelism. For as we stated in oral argument and at a pretrial conference to Judge Clarie, (statements apparently not brought to the attention of Judge Blumenfeld) we recognized that conscious parallelism without more was not enough. In our memorandum in opposition to summary judgment we stated:

> "Defendants have raised a red herring in each of their briefs by indicating that plaintiffs' case is based solely on proof of parallel business behavior. To be sure, plaintiffs will rely to some decree of proof of parallel business behavior, but plaintiffs recognized that such proof without more is not ordinarily sufficient in and of itself to constitute the Sherman Act defense." Cf. Brown v. Western Massachusetts Theaters, Inc., 288 F 2d, 302, 1 Cir. 1961; Winchester Theater Company v. Paramount Film Distributing Corporation, 324 F. 2d 652 (1 Cir. 1963), and Ford Motor Company v. Webster Auto Sales, Inc., 361 F 2d, 874 (1 Cir. 1966).

Nevertheless, as the Tenth Circuit has said, "Such behavior is another item to be weighted, and generally, to be weighted heavily". Morton Salt Company v. United States, 235 F. 2d 573, 577, (10 Cir. 1958).

The reason that parallel business behavior in and of itself does not afford a basis for finding a conspiracy is that economic theory has shown that business occupying the same or similar economic positions will often make the same or similar economic decisions. But the significant question to ask is whether the action taken by the alleged conspirators is "independent" and unilateral or "interdependent". "Interdependent" action should be distinguished from wholly independent and unilateral action. In the latter situation, each purchaser would have refused to purchase, even if one or more of the purchasers decided to do so. In a selling situation such as in Theater Enterprises, Inc. v. Paramount Distributing Corporation, 346 U.S. 537 (1964) the jury issue was whether each decision not to sell was wholly

independent of the decisions of the other. Indeed, if this case were allowed to go to the jury that is the decision which the jury would be required to make.

As Professor Turner pointed out, that situation was a situation where identical, but unrelated responses by groups of similarly situated competitors to the same set of economic fact was applicable. Turner, Definition of Agreement Under the Sherman Act: Conscience Parallelism and Refusals to Deal, 75 Harvard L. Rev. 655 (1962) Without more motive, such responses did not violate the Sherman Act. On the other hand, here we claim that the decisions which were made were consistent with defendants self-interest only if all concerned decided the same way and only in light of the restrictive method of competition for development of expiration dates which had come to be a custom in the industry and a basic tenet of the American Agency System.

3. Proof of the Interdependent Concerted Action

We cannot understand Judge Blumenfeld's statement,

"The plaintiffs freely admit that in support of their basic contention that the defendants conspired to reject their proposal, they are unable to set forth specific facts in opposition to defendants motion for summary judgment." (Ruling, p. 21)

That, of course, is exactly the opposite of what our claim was below and what it is here. What we did say and advised the court at various points throughout the proceedings, was we did not have direct evidence of all of the conspirators sitting down in a room and drawing an agreement in writing, or otherwise, to follow this course of conduct. We have always claimed that the facts such as those cited above were sufficient from which a trier of fact could infer that an unlawful agreement was operative and was followed in preventing plaintiffs from marketing their lists of expiration dates.

The issue which the trier of fact must ultimately resolve in this case is whether the refusals to purchase plaintiffs product were part of the "long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion

as to the parties with whom he will deal". United States v. Colgate and Co. 250 U.S. 300, 307 (1919), or whether they were part of an action in concert with others to form a group boycott or concerted refusal to deal which is per-se illegal. Klor's Inc. v. Broadway Hale Stores, Inc. 359 U.S. 207, 210 (1962).

The Colgate case relied upon so heavily by all of the defendants, and by the district judge, has to a large decree been distinguished and limited. It has long been settled that group boycotts are conclusively presumed to be unreasonable because of their pernicious effect on competition and because of the lack of any redeeming virtue. Northern Pacific R. Co. v. United States , 356 U.S. 1, 5 (1958) Fashion Originators Guild, Inc. v. FTC, 312 U.S. 457, (1941), Eastern States Retail Lumber Dealers Association v. United States, 234 U.S. 600, 613-614 (1914); United States v. General Motors Corporation, 384 U.S. 127, 86 S. Ct. 1321, 1331, (1966); Ford Motor Company v. Webster Auto Sales, Inc.; 361 F 2d. 874 (1 Cir. 1966).

Colgate moreover, was qualified substantially in U.S. v. Park Davis and Company, 362 U.S. 2980 F. Ct. 503 (1960). There, without any actual "agreement" the court decided against the companies wholesale and retail resale price fixing efforts. The firm announced a policy of resale pricing. In the courts view the fault lay in the fact that the announced policy created a combination with wholesalers who cooperated by cutting off retailers who did not accede and the company created a combination with retailers because their acquiescence and suggested prices was secured by threats of termination. Thus the court found the Section 1 Sherman Act necessity of a contract, combination, or conspiracy concluding with the company's refusal to deal was not, in fact, wholly unilateral.

In Albrecht v. Herald Company, 390 U.S. 145, 88 S. Ct. 869 (1968) the Supreme Court again was concerned with the problems of others being involved in a refusal to deal. It suggested a number of combinations that could have supported a newspaper distributors' Sherman Act complaint against a former

supplier. The suit involved the newspapers' competitive encroachment of a dealers exclusive territory assertedly undertaken because the dealer had refused to keep his home delivery prices down to a level sought by the publisher. The court suggested in Albrecht combinations that included one between the dealer himself and the supplier, "at least as of the time the dealer unwillingly complied" with resisted conditions. One significant factor to be considered in whether or not a decision not to purchase is merely unilateral or interdependent is the factor of coercion. Nowhere in his decision does Judge Blumenfeld deal with the coercive factor outlined above. Cf. Simpson v. Union Oil Company, 377 U.S. 13, 84 S. Ct. 1051 (1961); U.S. v. Arnold Schwinn and Company, 388 U.S. 365, 87 S. Ct. 1856 (1967).

Given the facts cited above, we think the proof in this case amply provided the "something more" necessary

necessary to a finding that a decision not to purchase was not unilateral but interdependent.

4. The Nature of Proof Required

It is, of course, unnecessary to prove an actual agreement. It is enough that knowing that concerted action was contemplated and invited the defendants gave their adherence to the scheme and participated in it. Acceptance by competitors, even without previous agreement of an invitation to participate in a plan, the necessary consequence of which if carried out is a restraint of trade is sufficient to establish an unlawful conspiracy under the Sherman Act. Interstate Circuit Inc. v. United States, 306 U.S. 208, 51 S. Ct. 67 (1939); Standard Oil of California v. Moore, 251 F. 2d 188, (9 Cir. 1957).

Here we charged in paragraph 32 a course of concerted

action and conduct designed to pressure the agency company competitors and others in the industry not to purchase expiration dates from the plaintiff. Response to pressure resulting in a business decision one would otherwise not have taken is a basis for finding a Sherman Act violation.

In Ford Motor Company v. Webster Auto Sales, supra, 361 F. 2d 874, the First Circuit sustained a verdict for damages which resulted from a conspiracy which in purpose and form was not dissimilar to the one in the instant case. There, the plaintiff had been engaged in the business of selling used cars. A substantial part of his business was selling company cars, or factory Fords. Factory Fords were new Fords which had been used by Ford employees for demonstration and sales purposes only. Ford had offered those cars to its dealers on a high-bid basis. Plaintiff had arranged with one Ford dealer to pay the latter fifty dollars above the bid price for each factory Ford. Plaintiff then took the cars to a Springfield used car lot from which he

sold them. A Springfield Ford dealer complained to the Ford district manager about the presence of factory Fords on plaintiffs lot saying he was not happy about the presence. The district manager acknowledged that the situation was not good for the complainant's company and directed the officer in charge of distribution of factory Fords to correct the situation.

Subsequently, a letter was sent out announcing the presence of new factory Fords and asking the dealers not to bid on units for the purpose of reselling them to wholesalers following the letter that plaintiff was unable to obtain factory Fords from his former source, and, subsequently, suffered substantial loss of profits.

The First Circuit found the sequence of events to be an agreement in violation of the antitrust laws. The court said the essential fact is defendants action in imposing the restriction was not unilateral but was instigated by one of its dealers and cannot, therefore, be said to fall within the rule of Colgate. Similarly, in Flintcote Co. v.

Lysfjord, 246 F. 2d 368 (9 Cir. 1957). The Court of Appeals held that there was sufficient evidence from which a refusal to sell could be considered to be a result not of the exercise of ordinary business judgment, but the exercise of threats made and pressure applied by members of a conspiracy to and against a supplier.

In this case, we believe the defendants decisions were instigated in whole or in part by pressures which:

(a) were inherent in the industry; and

(b) which were brought to bear on the companies by organizations such as the CAIA and other independent agent associations (See supra p.

This is an easier case than the two cited above because of restraint on competition in the production and marketing of expiration dates was not only in existence prior to plaintiffs attempted entry into that field, but had come to be accepted as a "custom of the industry" and "basic tenet of the American Agency System".

Of course, it is not necessary for plaintiffs to have direct proof of some singular meeting at which an unlawful decision not to purchase plaintiffs expiration date was reached. Many courts have pointed out that conspirators do not advertise their purposes. They do not make minutes of their meetings, and they work in the dark. Their methods being secret and clandestine.

Moreover, the methods may be more sophisticated than a simple meeting. They may resort to a course of conduct resulting in a sequence of events from which only a single ultimate course of decision making can follow. That is what happened here. As such a plan becomes established (here by the initial distribution of the June 6, 1972 letter by the Hartford company to its agents) the effects are more difficult to disentangle from the effects of usual business hazards and the evidence of the conspiracy or combination must often be elicited from the unwillingly lips of its participants, or from a logical piecing together of the facts and documents in the case. Hale v. Hatch and North Coal Co.

204 Fed. 433 (2 Cir. 1917); Lawler v. Loewe 209 F. 2d 721 (2 Cir. affirm. 253 U.S. 522) so that it becomes necessary to piece the conspiracy together by the sequence of events or course of action such as was the subject of the Webster Auto Sales litigation or the General Motors litigation. In General Motors, 384 U.S. 127 (1966) the court said:

> "Although we regard as clearly erroneous and irreconcible with other of its findings, the trial courts conclusary findings that there had been no 'agreement' among the defendants and their alleged co-conspirators, there has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy-certainly where, as here join in collabative action was pervasive in the initiation, execution and fulfillment of the plan...
>
> What resulted was a fabric interwoven by many strands of joint action to eliminate the discounters from participating in the market to inhibite the free choice of franchise dealers to select their own method of trade and to provide multilateral surveillance and enforcement. This objective for achieving and enforcing the desired object, can by no stretch of the imagination be described as unilateral or merely parallel".

Here then, we have cited facts from which we believe the district court should have allowed a jury to infer a concerted course of conduct including conduct based on a long standing custom and practice in the industry. A deliberate

attempt to rally public opinion in the insurance industry against the defendants, unlawful approaches to the insurance commissioner of the state of Connecticut, all of which resulted in interdependent decision making by the defendant agency corporation. We find nowhere rather drawing all of the inferences favorable to the defendant, Judge Blumenfeld finds on a factual disputed record that it was not in the defendants self-interest to purchase plaintiffs, p. 23 ed. sec.

5. In Determining That It Was Contrary To Defendants Self Interest To Accept Plaintiffs Proposal The District Court Improperly Made Finding Of A Contested Factual Issue

The district court found that it was not contrary to the defendants self interest to reject plaintiffs proposal apparently relying on three facts: (1) that plaintiff had no prior dealing in X-dates; (2) that the defendants must rely on the independent insurance agents

for sale of their insurance; and (3) that the defendants would be unable to absorb the entire output of plaintiffs' research. The court could reach this conclusion only by selecting from the record those facts favorable to the defendants and ignoring those facts and inferences favorable to the plaintiffs.

(a) The Output Problem Was Nonexistent

For example, Ellis of Aetna, had advised D'Arpa that "he was delighted with the tests so far... and the Newark office found that the names, addresses and expiration dates were 95% to 100% correct. They had called on thirty-four out of the hundred names submitted. They reported that they had made seven sales as a result of the thirty-four sales made". (D'Arpa, 141,

Moreover, on November 30, 1962, Ellis told D'Arpa that the program had gone right up to the top people in the company and that it was thought of most highly and that a meeting had been held with the number of agents and had a

majority of exceptance (D'Arpa 161,

In reaching its decision, nowhere does the court account for the memorandum sent to D'Arpa by Ellis stating "Bob: as per our phone conversation today, don't count us out on this. We will have our problems, but who doesn't?" (D'Arpa, 143

On the same date, June 29, 1962, Ellis said there were rumblings going on and that he would send D'Arpa some of the newsreleases from the organizations in the newspapers that had just come out recently. (D'Arpa, 144) And following the final rejection by Aetna on July 17, 1962, Ellis advised D'Arpa in November of 1962 that the program had not been accepted because he didn't know if it was worth the beating that Aetna would have to take. When D'Arpa asked him, "What kind of beating are you referring to?" Ellis replied the pressure from the other companies. And he went on to say that they would have to contend with the commissioner of insurance and mention the Hartford company and Barlow. (D'Arpa, 162) And in accepting the Aetna claim that the projected costs was too heavy, the

Court ignored not only the above testimony but the timing of the rejection. At the time it was rejected, Travelers had just sent out its June 27, 1962 mailing. (App.Ip.) Moreover, plaintiffs indicated that they would have restricted or eliminated certain areas that Aetna did not feel would be profitable for them. They made the same offer to other companies. (D'Arpa, 135)

The Hartford companies initial response also ignored by the court, was not that it could not accept the numbers of X-dates which plaintiff sought to sell or that the price was too high, but rather that it was distrubed to find out that the list of expiration dates would be offered, not exclusively to Hartford, but to another company as well. (D'Arpa, 196, 202). Similarly, the Travelers rejection, even in the admitted version was not for price or for an inability to absorb the dates supplied by plaintiff, but rather that "because of Travelers commitment to the independent system of agency representation". (D'Arpa, 582,

(b) The Dependence On Agents Is A Fact
In Plaintiffs' Favor

Next, the district judge strangely used the defendants dependence on agents as a justification for their refusal to purchase plaintiffs program. (Ruling, p.25 et seq.) It is exactly that dependence which plaintiff claims was at the heart of the campaign of pressure. Had the agents no basis for applying pressure to the companies, then Barlow's (Hartford) calculated letter would have served no good and Travelers subsequent repetitive issuance of Barlow's letter would have been ineffectual. It is our position that if there is a property right in expiration dates as Judge Blumenfeld has found, and that if that property right is legally the subject of a contract between an agent and company, there is still no justification for permitting and enforcing a system within the industry where in new competitors in the business of developing and marketing expiration dates to insurance companies are precluded. The district judge found that the companies were never previously purchased expiration dates. What he failed to find, and what we believe

in the context of this case, he was required to find was that the plaintiffs were in direct competition with insurance agents for the production and sale of expiration dates to the agency insurance companies. To be sure, the agents had not previously sold lists of expiration dates, except to the extent that each agents client list could be considered an expiration date list. But that is beside the point. It was plaintiffs who developed a new method of compiling lists.

Judge Blumenfeld's reasoning is akin to sanctioning a concerted refusal by the automobile manufacturers to install a new gas saving device or safety device simply because the product had never been purchased before.

The only question which is appropriately considered is whether the determination not to purchase was a unilateral or an interdependent one. It is the very dependence on the independent agents which we believe gives credence to the claim that the decision not to purchase was neither unilaterally made nor intended.

Lastly, Judge Blumenfeld's finding fails to account for the fact that plaintiffs business was crushed in its incipiency. No doubt, the price of the names and the method of marketing the names could and would have been adjusted as the contracts proceeded to fruition and as time and experience dictated.

6. Plaintiffs Proposed Method of Marketing Its Lists of Expiration Dates Was Not Illegal

Going far beyond the ordinary limits in ruling on a summary judgment motion, the district judge reached out to find an issue that was neither brief, argued, nor raised by any of the parties, either during the course of the litigation, or indeed during the course boycott of plaintiffs program. The district court argued the issue as "not whether the proposal should have been rejected as one which would result in an unlawful distribution system, but whether it was so frought of eliminates of such a system that the risk of its illegality was substantial enough to justify the defendants refusal

to be a party to it". Ruling, p. 28.

In approaching this issue, Judge Blumenfeld appears to have decided that a concerted refusal to purchase plaintiffs product would be permissible if on any set of facts there existed some reason for rejecting that proposal. The question which this procedure raises is whether or not a victim of a group boycott is required to speculate on reasons which might have been given for not purchasing his product. Even though those reasons were not in the minds of the boycotters and were not the reason for the non purchase.

After his review of the law as it relates to exclusive dealing contracts, the trial court does not even conclude that the proposed method of marketing would have been illegal. Rather, all he concluded was "that it is surely plausible that this questions might have been decided adversely to any defendant who dealt with the plaintiff on plaintiffs terms". Ruling 34.

Even if this potential antitrust liability were a proper factor for the consideration by the court, and we do not believe it was, plaintiffs proposed marketing efforts

(1) were clearly reasonable under the circumstances; and (2) could, of course, have been changed if an antitrust problem arose.

The court considered three facts in questioning the legality of the marketing procedure: (a) the non-availability of competing products; (b) the intent to monopolize which he finds from a price which he considers to be a monopolistic price without any supporting evidence whatsoever; and (c) the substantial amount of commerce affected.

The court was wrong in assuming there were no competing products. As we have pointed out, agents are continuously producing X-dates. That they have not compiled them into a list is not a basis for determing that there is no competition. The whole boycott in this case, resulted, indeed, from the competition between the agents on the one hand, and plaintiffs on the other. Moreover, there was evidence that the companies themselves engaged in periodic promotions, designed to secure lists of potential customers and expiration dates.

The finding of an intent to monopolize is indeed strange, unless the court is considering that the monopolized market

was one company.

All of the other insurance companies where, of course, free to develop means of finding expiration dates lists, or from purchasing from any competitor who came into the market. It would seem reasonable for plaintiff to be entitled to some protection of the product which he was marketing and to be assured of a source of sales for its production, particularly in the incipient stage of its marketing efforts.

Judge Blumenfeld has cited, and we have found, no case indicating that the proposed marketing arrangements of plaintiff would have run afoul of either the perse or reasonableness proscriptions of the Federal antitrust laws. Thus the consideration of this fact was improper.

CONCLUSION

There was contained in the record a plethora of evidence from which a jury could reasonably infer that the agency companies' decisions not to purchase expiration dates from the plaintiffs were the result of non-unilateral coercive boycotting tactics in violation of the antitrust laws of the United States.

The decision of the district court should be reversed and the case should be remanded for trial on the merits.

Although it may have been a long time coming, plaintiffs are entitled to their day in court.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been sent, postage prepaid, this 27th day of September, 1974 to the following:

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